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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 CINDY CONAHAN,

4 Plaintiff,

5 v. 20 Civ. 1325 (LJL)

6 MEDQUEST LTD, *et al.*,

7 Defendants.

8-----x Oral Argument

9 New York, N.Y.
October 26, 2022
10 12:00 p.m.

Before:

HON. LEWIS J. LIMAN,

District Judge

14 APPEARANCES

15 KRAKOWER DICHIARA LLC
16 Attorneys for Plaintiff
17 BY: MICHAEL R. DICHIARA

18 BOND, SCHENECK & KING, PLLC
19 Attorneys for Defendants
20 BY: LOUIS P. DILORENZO

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1 (Case called; appearances noted)

2 THE COURT: So we're here today on the motion of the
3 defendants for summary judgment and cross-motion of the
4 plaintiff for summary judgment. I'm prepared to hear first
5 from counsel for defendants on their motion, as well as on the
6 plaintiff's motion. You can address both, and then I'll hear
7 from plaintiff then I'll hear from defendants again. At the
8 conclusion of the argument today, I'd like you both to stay
9 around to order a copy of the transcript on an expedited basis
10 so I've got it available to me. Go ahead.

11 MR. DiLORENZO: Your Honor, our motion for summary
12 judgment, the case involves age, sex and retaliation on the
13 claims that were brought. We don't believe, as our papers
14 indicate, that even a prima facie case has been established in
15 any of them. And if there was a prima facie case established,
16 we think we've articulated legitimate non-discriminatory
17 reasons for the two discrimination cases. I'll talk about the
18 retaliation case separately.

19 On the age case, the plaintiff worked for this
20 company, small company, six employees for about 28 years. She
21 was hired by the owner who was two years older than her. He
22 hired her at the time. She worked for him, closely with him,
23 handling all the money, running the office. He is the owner,
24 very actively involved in the business. He was two years older
25 than her. He's the decision maker. Under no circumstances is

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2 there any evidence to support an age claim. The entire age
3 claim hinges on a remark that was made to her -- she alleges
4 was made to her in a meeting shortly before she left work on
5 her own. She decided to leave. What happened was, there was a
6 meeting. The owner's wife, the other individual defendant,
7 Leslie Inzunza. Leslie had come into the operation about a
8 year earlier as an independent contractor with a design of
9 modernizing the office, creating computer systems, enhancing
10 the technology and so on, also hiring a forensic accounting
11 firm to look into all the systems that were being used in the
12 office. Which greatly upset the plaintiff actually and caused
one of the confrontation with the defendant and her earlier.

13 The day before this alleged remark was made, there was
14 a meeting with the accountants that had issued a report with
15 recommendations as to how the office should change. The
16 plaintiff was very upset during that meeting, grimaced, made a
17 number of faces, got angry. And by her own admission, she shut
18 down in that meeting, refused to cooperate any further. The
19 next day Leslie sent a text message to their accountant saying
20 she was going to go in and talk to her because they needed her
21 help to implement these systems, and she was going to try to
22 reengage her. She went into her office for that purpose, had a
23 discussion with her.

24 One of the things she tried to explain was that if the
25 technology was better, everybody in the office would be able to

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work more easily remotely, which they were doing from time to time but problems with the systems. This was before the pandemic. The plaintiff got upset. She then launched into a tyrant about things that were wrong with Leslie's husband, how he didn't know what he was doing in the business. How everything that had been done was owed to her.

At that point, Leslie indicated to her she should lay off the Xanax. She took Xanax. The plaintiff took Xanax. In fact, she admits she had given Xanax to Leslie in the past when she asked for it. She then -- our version is she chased Leslie out of the office. She ran into her husband's office, closed the door. Plaintiff admits that she barged into that office without knocking. She shook her bottle of pills. Said I'm taking pills, I'm not a drug addict. Your wife's accused me of being a drug addict. She claims she said something about she's accused me of being too old to commute. Although in her deposition the only time she said that was when her deposition was finished, and plaintiff's counsel asked her a leading question at the end of that deposition --

THE COURT: It may have been in response to plaintiff's counsel's question, and it may have been a leading question. In fact, it was a leading question, but she still answered yes to the question. Did you tell Elliot -- referring to the individual defendant -- that Leslie had said you were too old to commute to the city. So isn't that enough to create

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2 a triable issue that when she was fired by Leslie's husband a
3 week later after they had been on vacation together that the
termination was based upon age.

4 MR. DiLORENZO: I don't believe, with all due respect,
5 your Honor, I don't believe so. There's no testimony
6 whatsoever -- there's no proof or evidence of any kind that
7 Leslie influence his decision to terminate her. In fact, she
8 called -- when he talked to her the next day, she left on her
9 own. She said, I'm leaving, and she left the office because
10 she was so upset. The next day when they spoke on the phone,
11 the first thing she said to him was, Do I still have a job.

12 And when I asked her at her deposition why would you
13 ask that question the next day. She said because I had just
14 thrown -- then she caught herself. And said, Asked his wife to
15 leave. Because I threw -- stopped, I asked his wife to leave.
16 Why would she ask the next day do I still have a next job if
17 all she did was ask his wife to leave her office, please leave
18 my office.

19 THE COURT: And Mr. Stone's answer was, We have to
20 talk about it when I get back from vacation.

21 MR. DiLORENZO: That's correct. And he refused to
22 accept -- he told her, I don't know if you have a job. I'm
23 going to have to think about. This is bad.

24 THE COURT: So can't a jury infer that during the week
25 that he was thinking about it, or maybe it's not even a full

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1 week when he was with Leslie and then he comes back and says, I
2 need to terminate you, part because of this thing with Leslie
3 that he was terminating her because of her comment that she's
4 too old to commute.

5 MR. DiLORENZO: I don't believe so.

6 THE COURT: In other words, it's not really a stray
7 remark because it's made by somebody who is present in
8 presumably the most intimate way one can be under the law with
9 a decision maker for an extended period of time immediately
10 preceding the time when the decision is made.

11 MR. DiLORENZO: Well, your Honor, that would be pure
12 speculation. I don't know what the jury could rely on to make
13 that allegation. She admitted to us in her deposition she has
14 no evidence that Leslie influenced that decision. There's no
15 evidence other than speculation. The other thing is, your
16 Honor, it still has to be a discriminatory remark. All she's
17 saying is -- she's claiming is, You're too old to commute.

18 It wasn't said in the context. There's no
19 relationship between that stereotypical remark, a stereotypical
20 remark based on age with the adverse employment action that
21 they're claiming was taken. It was made in the context of,
22 including the text message sent to the accountant before the
23 meeting, I need to engage her. Yesterday's meeting was a
24 disaster. She's not helping us with the new technology. The
25 appeal made was, it will make it easier for people to work

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2 remote including yourself. And so the context is not -- the
3 context of the remark was you can continuing to work for us.
4 It would make it easier for you to work for us. Not that, you
5 know what, You're too old to work. You're too old to commute
6 to New York so you need to leave employment. Nobody says that
7 was the subject of the conversation. So the context is not
8 even discriminatory. It still has to be discriminatory
comment.

9 THE COURT: That's a very powerful argument. And if I
10 were a fact finder, maybe I would agree with you, but isn't
11 there enough that a reasonable jury could disagree and I should
12 leave it to the jury to make that determination or at least at
13 this stage I need to leave it to the jury to make that
14 determination and we'll see how it plays out at a trial?

15 MR. DiLORENZO: Your Honor, I don't believe so because
16 I think when you look at the stray remark cases this doesn't
17 fit any of that. It's 28 years, no remark. The comment was
18 not made in the context of opposing age discrimination or age
19 discrimination by Leslie or Elliot. In 28 years of working
20 together, she's never heard an age or sex discriminatory remark
made by anybody in that office.

22 THE COURT: Can you refresh me as to what the summary
23 judgment record looks like as to the latest date that Mr. Stone
24 said to the plaintiff, You've got a job. I want you to stay
25 around.

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1 MR. DiLORENZO: I'm sorry.

2 THE COURT: I know that there is testimony to the
3 effect that Mr. Stone told the plaintiff that her job was not
4 at risk, that he would want her to stay around. What is the
5 latest date on which such a statement was made to the
6 plaintiff.

7 MR. DiLORENZO: I think it was made during the period
8 that -- I'm not sure the exact date, but I think it was made
9 during the period of approximately within a year of the
10 termination while because of -- and she admitted in her
11 testimony -- that she didn't enjoy Leslie coming to the office
12 and engaging in this modernization and she was upset about
13 those things and the threat to her position and all the control
14 and autonomy she had had running the office. So he tried to
15 put her at ease.

16 And in fact during that period there was a potential
17 sale of the business to another company, and he indicated to
18 her he wanted her to stay. He wanted her to stay through that
19 sale if it happened. She had a job and tried to reassure her
20 on that basis that she had employment. But it was all out of
21 her insecurity and concern about this modernization approach,
22 that we're not going have to handmade records anymore. We're
23 actually going to be modernizing the business. Leslie is
24 coming in to help do that. We're going to have new technology,
25 and she admitted in her deposition that upset her.

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2 THE COURT: It very well may be that the truth, in
3 quotation marks, is that plaintiff was terminated because she
4 had an angry -- she was not cooperative with the accountants
5 and she had an angry conversation with Leslie after which she
6 ran screaming into Mr. Stone's office and Leslie had to hide
7 behind a chair that seems like it's quite a powerful argument.
8 But isn't it at least plausible that what changed between when
9 Mr. Stone was giving the comforting words to the plaintiff and
10 the decision to terminate was the comment about you're way too
old?

11 MR. DiLORENZO: I don't know how your Honor because,
12 assuming -- the record doesn't contain it, but assuming there
13 was vacation talk between husband and wife about what happened,
14 the context of the conversation was, It will make it easier for
15 you to do your job. If age has something to do with how easier
16 it is to commute in and out of New York City, that stereotype,
17 that alleged stereotype remark in this context, even in the
18 context she's alleging, doesn't indicate any adverse action is
19 going to be taken. The opposite. We're trying to make it
20 easier for her to do her job. She should embrace the
21 technology because at the end of the day, it's only going to be
22 good for her and everybody else and the business.

23 That's clear from the meeting the day before. The
24 purpose of the going into her office to try to calm her down
25 and reengage her because they needed her help because she

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2 controlled all the systems at the time. And the comment was,
3 it will be better for you too. It will enable you to do your
4 job and work as long as you want.

5 THE COURT: I understand that point.

6 MR. DiLORENZO: That's the age one. Your Honor, I
7 don't see anything on the sex one. Her replacement, they
8 offered the job to a woman. Leslie is a woman. There's no sex
9 remarks.

10 On the retaliation, your Honor, everything turns in my
11 mind on the statement we've been talking about which is alleged
12 to be opposition to discriminatory activity of the employer,
13 that she complained about the remark. And if you look at their
14 complaint, they made it very clear that she reported the
15 discrimination to Elliot. I think it's paragraphs 34 and 35 of
16 their complaint paragraph 56. She complained about
17 discrimination to Elliot, and as a result she got fired. As I
18 said before, Leslie was an independent contractor. The
19 complaint was not about any employer policy.

20 THE COURT: Couldn't a jury conclude that she was at
21 least an employee and a pretty senior employee from her various
22 statements that she makes in terms of -- she makes a number of
23 statements in terms of what she needs the plaintiff to do where
24 it looks like she's actually exercising some control and
25 authority on the part of the company.

MR. DiLORENZO: Well, your Honor consultants can have

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3 authority, and she was given authority to work on the
4 modernization of the equipment, make some changes in how things
5 were being done. But regardless of whether --

6 THE COURT: Surely it's not the fact that she's being
7 paid pursuant to a 1099 that categorically as a matter of law
8 disqualifies her from being an employee.

9 MR. DiLORENZO: Well, it's true, your Honor. Just the
10 fact that she's a 1099 employee or a 1099 person doesn't make
11 her an independent contractor or an employee, the facts do.
12 But as you can see by the way things were happening, she said
13 in the meeting and tried to facilitate between -- as was her
14 responsibility, facilitate between the accountants and their
15 report and the employee of medQuest that was in charge of the
16 office, the plaintiff. She tried to facilitate that. Then she
17 worked with the accountants, said I'm going to go talk to her,
18 try to reengage here.

19 If she was a high level employee, she could have fired
20 her at the meeting where she shut down and refused to
21 cooperate. Instead she was working, which the responsibility
22 she was given as a consultant to try to modernize the office,
23 engage the office in becoming better with technology and so on.
24 Whether she's an employee or an independent contractor -- I'm
25 sorry. I forgot what I was going to say.

THE COURT: You were going to -- whether there was
protected activity.

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2 MR. DiLORENZO: Yes. She still has to be complaining
3 about discrimination at the hands of the employer. And whether
4 she's an independent contractor employee, she has to be some
5 kind of decision maker. She has to have made the decision.
6 There's no evidence in this record at all that she made the
7 decision to terminate the plaintiff that was made by Mr. Stone.

8 THE COURT: I mean, that goes back to the discussion
9 we had earlier. Assuming that I disagree with you on that and
10 conclude that a jury could reach the conclusion that Leslie had
11 an influence on the decision, and that Mr. Stone fired the
12 plaintiff because of something that -- either that Leslie said
13 to him or that was reported to him about the plaintiff, about
14 Leslie's discriminatory conduct, wouldn't that be enough to go
to a jury?

15 MR. DiLORENZO: I don't think so, your Honor. We've
16 put forth legitimate non-discriminatory reason for the
17 termination. It's the same one the plaintiff went to bed at
18 night thinking about the next morning. Why did you say, Do I
19 still have a job. Because I threw -- oh, I asked his wife to
20 leave my office. So there's the non-intervening
21 non-discriminatory reason. And I still don't see the complaint
22 about a discriminatory activity. She admitted in her
23 deposition I never used the word "age." I never used the word
24 "discrimination." In fact, after those questions --

25 THE COURT: What if she testified that she went into

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2 Mr. Stone and said, Leslie said I'm too old to commute to the
3 city. That's discriminatory and I don't like it. Would that
4 be protected activity?

5 MR. DiLORENZO: I believe it would be, your Honor. If
6 she said -- not that I don't like it. If she said I'm too old
7 to commute to the city, and I believe that's age discrimination
8 or discriminatory, enough specificity to make it clear she's
9 complaining about discrimination, not a general grievance. I
10 don't like the way she talk to me. She accuse me of being a
11 drug addict. Those things don't qualify. The cases are pretty
12 clear on that.

13 THE COURT: You don't need to put a particular label
14 on your claim of discrimination. Let's put it in a different
15 context. Let's say that an employee went into a boss and said
16 so and so called me a racially derogatory term. And then
17 shortly after that the employer fired the person who had --
18 who's the subject of the racially derogatory term, couldn't a
19 jury find that the decision was made -- couldn't a jury find
20 that the complaint that somebody was called a racially
21 derogatory term was protected activity.

22 MR. DiLORENZO: Yes, I believe. But I think that's a
23 different case, your Honor.

24 THE COURT: Because this is way too old to commute --

25 MR. DiLORENZO: Because of the context of the
conversations. It's not a discriminatory remark. The race

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3 comment on its face would be -- would indicate discriminatory
4 animus. This is the opposite. This is a meeting, by all and
5 every piece of evidence in the record, a meeting for the
6 purpose of trying to get her on board with the modernization.
7 And the remark, if it was made -- I guess we have to assume for
8 the motion it was made -- the remark was made in the context of
9 convincing her that embracing the technology and being able to
10 work remotely would cut down on how much commuting she would
have to do to New York and still do the job and be able to do
the job help, her do the job.

11 THE COURT: I don't know that either of you have
12 looked at or cited to me the Second Circuit's decision in a
13 case called *Milord*. It's a case in which I granted summary
14 judgment to the defendant and the Circuit reversed me finding
15 that a comment that I had concluded was not particularly
16 race-based could be construed by a jury to be race-based. And
17 that on the basis of that, a jury could also conclude that the
18 otherwise legitimate non-discriminatory reasons for the
19 employee's non-promotion were protectoral. It's worth looking
20 at.

21 MR. DiLORENZO: Thank you, your Honor. Wish I had. I
22 did get a bunch of your cases. I didn't see that one. In any
23 event, your Honor, I just don't see how that remark could be
24 considered protected activity in the terms of an actual
25 complaint. I just don't think she was coming in to complain

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3 about age discrimination. I think should would have used those
4 words, something like that. As opposed to the emphasis on the
5 Xanax, and she's accused me of being a drug addict, and she
6 told me that you're building a file on me. You have a file on
7 misconduct that I've engaged in. This termination didn't come
8 out of the blue, your Honor, that problems had been persisting
9 since 2015. There's a bunch of handwritten notes about the
10 conduct towards other employees. It's a small business, six
11 employees. She had the HR function. There was no HR director.
12 Again, I just think that the cases indicates that's a stray
13 remark that really can't support a retaliation claim. It's
14 just too general, especially the context that it was made in.

15 THE COURT: Do you want to address the counterclaim?

16 MR. DiLORENZO: Yes, your Honor. And, your Honor, I
17 want to apologize for the mix up on the affidavit we submitted.
18 It was terrible. I apologize. You have no idea what I went
19 through on those two occasions of amending that.

20 Our counterclaim, your Honor, is pretty simple. Your
21 Honor, before I leave the retaliation. I just want to say that
22 in these papers for the first time the allegation was made that
23 the counterclaim itself is a form of retaliation. That's not
24 in the complaint. And, of course, it couldn't be because the
25 counterclaim -- and we raised this in our papers, your Honor.
The counterclaim came obviously after the complaint. The
complaint has never been amended. The complaint alleges

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retaliation that resulted -- retaliation by the defendant that
resulted in her termination. She was terminated.

THE COURT: There is a paragraph in the complaint.
It's paragraph 40, where the plaintiff says, In another act of
retaliation, defendants have threatened to sue plaintiff if she
pursues her claim.

MR. DiLORENZO: There's nothing in the record that I
know of concerning that, your Honor.

THE COURT: I mean, that may very well be right, and
it may be the reason why ultimately their claim of -- that the
counterclaim is retaliatory will not survive. But it may not
survive because it's not objectively baseless, and not because
it's not referred to in the complaint. I take your point that
in order for me to rely upon the allegation in the complaint as
raising a triable issue, there has to be some evidence in the
record. It can't just be an allegation in the complaint, but
complaints are supposed to put parties on notice. And this
allegation seems to sufficiently put you on notice that I can't
get rid of it on that particular basis.

MR. DiLORENZO: Well, your Honor, shortly before the
summary judgment motions were filed we produced to the
defendants a number of documents we received from credit card
companies and other companies. An objection was made by the
plaintiffs indicating they were going to seek sanctions, delay
in the proceedings, further depositions and so on. I wrote a

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letter to the Court saying that we would withdraw them because
we weren't relying on them. You said we could dismiss the
objections and get on with it. If they're allowed to proceed
on this retaliation claim of the counterclaim being the
retaliation, I would ask for an opportunity -- because that is
part of the material they relied on.

THE COURT: We'll talk about that after the plaintiff
gets up. I'm skeptical with respect to the retaliation claim
with respect to the counterclaim. I do have questions about
whether the counterclaim should survive as a counterclaim.
Leave aside the bit about retaliation, so why don't you focus
on that.

MR. DiLORENZO: So, your Honor, the motion for summary
judgment on the counterclaim by the plaintiffs was odd in that
there was no real support for the motion. The declaration from
the plaintiff came in response to our opposition. We then
got -- which contains a number of things I would like to reply
to, but I didn't have an opportunity.

THE COURT: What do you say, construing the evidence
favorably to the non-moving party, being you, the evidence in
the summary judgment record which show that would support a
jury verdict that the plaintiff here breached her fiduciary
duties?

MR. DiLORENZO: It would be, your Honor, the testimony
of Elliot Stone principally in terms of bank accounts that he

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1 does not believe he opened in banks, one of the banks is in
2 Tribeca. He never was aware they had an account in Tribeca. He
3 signed things -- his declaration back to the response they had
4 would have been, she put things in front of him and he signed
5 them. Those checks that she made out to cash for two and
6 \$3,000 on that account, he has no knowledge of what that was
7 for. He doesn't understand why there would be checks made out
8 by her for cash in those amounts. He has no recollection of
9 them whatsoever.

10 THE COURT: So I take it your point is that those
11 checks for cash are not for company business, and therefore
12 constitute a breach of fiduciary duty?

13 MR. DiLORENZO: Yes. In his declaration he indicates
14 that, either him or Leslie, that the business is not a cash
15 business. They paid their bills by check. The only cash that
16 he would get would be from -- have her get from the ATM machine
17 for three or \$400 a week that he would need for spending money,
18 but not checks made out to cash for \$2,000 for these various
19 accounts.

20 THE COURT: I do have one other question, and then
21 I'll give you a minute or two at the end. It was not clear to
22 me from your papers in terms of your theory of breach of
23 fiduciary duty, in particular the damages that you're seeking.
24 I could see two alternatives, and maybe you're pursuing both.
25 One of them is the, quote, faithless agent type theory where

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3 basically you're seeking all of the compensation that the
4 plaintiff was paid. The New York cases, I'm sure you're aware,
5 make that a difficult claim to pursue. There also are cases
6 where a person has not totally abandoned their role as a
7 fiduciary, but they breached their duties in particular
8 respects given rise to claims for damages. Are you pursuing
9 solely a claim that she was a faithless agent who totally
10 abandoned her role and you're entitled to get everything back?

11 MR. DiLORENZO: Your Honor, the way I read the New
12 York cases, if there's a breach of a fiduciary duty, including
13 embezzlement, that that is a total breach of your obligation.
14 Not that you -- the cases I've been involved in, it didn't
15 matter whether they continued to do their job if they engaged
16 in that breach of a fiduciary duty. And here, we also have the
17 transit check issues.

18 THE COURT: And you say under the case law you get
19 everything back?

20 MR. DiLORENZO: Yes, your Honor.

21 THE COURT: If I disagree you with you on that, do you
22 lose?

23 MR. DiLORENZO: I understand, your Honor. I guess
24 that would be an alternative theory as to whatever the remedy
25 would be appropriate if it was found, if that was the way the
cases were read. Somehow we're entitled to something if
embezzlement --

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1 THE COURT: I need to look back at the case law, which
2 I will. The cases that I'm familiar with, there's a New York
3 case some time ago involving *Kozlowski* from Tyco where the
4 claim was that he was taking money from the company. I think
5 that courts concluded on the allegations there that he had
6 totally abandoned his role as a fiduciary. But I don't think
7 that the case would have come out the same way if, for example,
8 he just took company money for one particular personal plane
9 ride.

10 Again, I would be surprised if the law supported the
11 notion that a employee who on one occasion misused the company
12 bank account to go to a nice steak dinner or pizza dinner, but
13 by virtue of that alone you could get everything back. I also
14 would be surprised if you can't get anything back, but I'll
15 hear from the parties.

16 MR. DiLORENZO: There's more than one incident here,
17 your Honor. The case I was involved in was a school district
18 in Long Island, and the gentleman was a business manager for a
19 long time. He was embezzling -- he had an embezzlement scheme.
20 He went on vacation and it was discovered. He worked hard. He
21 did a lot of work, but it was discovered that he was stealing
22 money, approximately a million dollars or something like that
23 over 15 years.

24 When we sued under the Faithful Servant Doctrine to
25 get the compensation back, the judge found it to be an

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2 equitable remedy -- state Supreme Court, equitable remedy, so
3 he gave us about a million dollars back and we also --
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5 THE COURT: Not the whole thing?

6 MR. DiLORENZO: A million dollars and his -- he stole
7 about a million dollars, so he gave us a million dollar in
8 compensation back. But we sued for future retiree benefits,
9 another \$2 million of future deferred comp that he was going to
10 get in the future while he was in prison. And when we appealed
11 it to the Appellate Division, they said it's a total
12 disgorgement involved. And I can send you that case, your
13 Honor, if you want to see it, but --

14 THE COURT: Do you remember the name?

15 MR. DiLORENZO: It wasn't dollar for dollar.

16 THE COURT: Do you remember the name?

17 MR. DiLORENZO: William Floyd school district, your
18 Honor. I'll can send it to you.

19 THE COURT: We'll find it. No need for you to send it
20 to me. I think I would like from both parties a brief maybe by
21 the end of this week just two to three pages maximum whether
22 the Circuit's unpublished decision in *Milord* has an impact on
the summary judgment motion. Let me hear from plaintiff's
counsel.

23 MR. DiCHIARA: Thank you, your Honor. One thing I do
24 want to add as far as the retaliation component with the
25 counterclaims. In our answer to the counterclaims, we did

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raise that they were retaliatory as an affirmative defense. We did have it in our complaint as your Honor noted, and in our answer to the counterclaim, so it's really to be disingenuous to claim that he had no idea that was an allegation at least the claim by plaintiff.

THE COURT: If you lose on summary judgment on the counterclaims, doesn't that really mean that the retaliation claim should go away?

MR. DiCHIARA: At least as it relates to the counterclaim. I would agree, your Honor, yes. But I do think there's plenty of evidence to show that the counterclaim is itself retaliatory. Again, I would just look at --

THE COURT: Why don't you focus -- I mean, when you get to the counterclaim, focus just on your motion for summary judgment and not on whether it's retaliatory, cover whatever you want first.

MR. DiCHIARA: Absolutely, Judge. I will start with the retaliation aspect of it. Again, we have her complaining on August 1st, that Leslie Inzunza told her that she was too old to commute to New York, but that's not the only evidence we have of age discrimination. We do have Leslie Inzunza -- I'm going to refer to her as Leslie because I have difficulty pronouncing the last name if you don't mind. She wrote notes about the meeting. And she wrote, I told her if, She's too tired and didn't want to be bothered learning new systems, she

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2 could move upon and we would wish her well. Again, it's
3 indicating that she's bringing age into this conversation.
4 Assuming that she's too tired, the commute. She's too old to
5 work, learning new systems. Again, she's an old dog, doesn't
6 want to learn new tricks. This is Leslie's statement. This is
7 not coming from the plaintiff here. So there is evidence there
8 that there's an age bias going on. And Leslie did take over
9 plaintiff's responsibilities, and Leslie is 18 years younger
than the plaintiff.

10 THE COURT: She took over the responsibilities though
11 only after a gentleman was offered the job and ended up turning
12 it down and there was somebody else who turned it down, so it
13 was not immediate.

14 MR. DiCHIARA: True, I will dear say those people that
15 were offered the job were certainly younger than plaintiff as
16 well. And again, as far as retaliation goes, we have Stone
17 saying that he expected plaintiff to be there as long as he
18 was, right.

19 THE COURT: Again the question I asked your adversary,
20 what's the latest date on which Stone makes that comment?

21 MR. DiCHIARA: I would have to say, in agreement with
22 my adversary, it was probably within the prior six months,
23 because that's when Leslie was going into the office more
24 frequently, having meetings with employees, sort of directing
25 them, making suggestions, so it was probably within that

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1 timeframe.

2 THE COURT: Which is the same timeframe of the
3 potential transaction. That's in someways the context in which
4 the statement is made, the big changes that maybe about to
5 happen with the business. They're enhancing their technology.
6 They may end up selling it. She's got a job.

7 MR. DiCHIARA: Correct. And as far as evidence of
8 retaliatory animus and whether Leslie was involved or not.
9 Certainly we have statements from Mr. Stone saying -- giving
10 the reasons why he terminated plaintiff. This thing with my
11 wife, What happened with Leslie. Those are his statements.
12 He's telling her why she's being fired, and those events
13 occurred one week prior to her termination.

14 Mr. Stone also said, look, plaintiff never complained
15 about the commute being too much. She never said she didn't
16 want to learn new systems. This is all coming from Leslie in
17 this meeting that she had with plaintiff. She raised these
18 issues, and we know it because she wrote it down. And it's
19 not -- again, we don't know. We weren't in the room when she
20 went to Stone's office. But it's not a stretch to say, Leslie
21 told plaintiff she was too old to commute to the city based on
22 what she wrote about what happened during that meeting, Leslie
23 and the plaintiff here.

24 And as far as the -- also those facts also relate to
25 the age claim as well, Judge, the prima facie case, the adverse

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1 employment action. She was terminated again, too old. And
2 it's not a stray remark if you look at the totality of the
3 evidence here. We have what was written by Leslie after the
4 meeting, her documentation of the meeting. Again, if she
5 didn't want to learn new systems, she was too tired. And
6 Leslie even admitted during her deposition, plaintiff didn't
7 raise those issues. Plaintiff never said she was too tired.
8 Plaintiff never said she didn't want to be bothered learning
9 new systems. That's Leslie's interpretation. That's her
10 injecting her own bias into what occurred between them.

11 And I would disagree as far as the gender claim cause
12 we have two male employees who did actually breach their duty
13 to the employer here. We have a Ryan Hilario -- who actually
14 worked for another company while he was working for medQuest.
15 Yet, medQuest didn't go after him, didn't sue him, didn't ask
16 him to return his salary. And we have another employee
17 Peter -- and I'm going to butcher his last name.

18 THE COURT: She was not terminated because she worked
19 for another company, right?

20 MR. DiCHIARA: No. But again, it's sort of all
21 conflating to the retaliation and the counterclaim, Judge,
22 because, again, they're suing her for allegedly breaching her
23 fiduciary duty, right. We have two employees who actually did.
24 We have evidenced. And Mr. Stone acknowledged that, it's not
25 like they're speculation as far as what exactly plaintiff did,

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2 whether she actually took any money, whether those checks
3 written out to cash ended up in her pocket. There's no
4 evidence that that occurred, but we do have solid evidence that
5 one male employee actually worked for another company. He
6 wasn't sued. And another male employee Peter -- again, I'm
7 going to butcher his last name -- Pawelczak.

8 THE COURT: You can just say Peter.

9 MR. DiCHIARA: Who brought his wife to a business
10 meeting down in Florida, and he expensed everything. He had
11 the company pay for everything, and he wasn't allowed to. And
12 he wasn't asked to reimburse the company for the expenses they
13 incurred with his wife. He wasn't sued for breach of a
fiduciary duty.

14 And also on those lines, this Peter, two other female
15 employees complained about him, that he was a misogynist. And
16 Mr. Stone did nothing about it. We also have Peter calling the
17 plaintiff an F'ing bitch while she was at work. Again, doing
18 nothing about it. To me this is evidence that she was treated
19 less well than other male employees, and that's the standard
20 under the City Human Rights Law.

21 And finally, Judge, on the age discrimination. Two
22 female employees who recently left medQuest were sued by
23 medQuest for breach of some confidentiality. Again, who is he
24 suing? He's suing plaintiff who is a female, two other females
25 employees who left, while he has two male employees who we know

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3 for certain engaged in egregious conduct as far as working for
4 another company and expensing his wife on a business trip when
5 he wasn't allowed to. There is evidence that that occurred.
6 Yet, nothing happen to them. He didn't pursue any action
7 against them. All he's doing is suing the women who use to
8 work for him.

9
10 THE COURT: So it is unlawful to file a counterclaim
11 or to -- after somebody has left their job that is my view
12 objectively baseless and done for retaliatory reasons. But is
13 it unlawful to sue somebody because the person is a woman or
14 some other protected characteristic? I'm not aware of that.
15 That's not an adverse employment action if the person is no
16 longer an employee. It's an adverse action that can give rise
17 to a retaliation claim, but not an adverse employment action
18 that could give rise to a discrimination claim, is it?

19
20 MR. DiCHIARA: I would agree, Judge. I do think that
21 it does go to an adverse action to support the retaliation
22 claim as a retaliate agent here, and that's why again we've
23 alleged that the counterclaim is retaliatory for that reason.
24 But again, I think it also does show under the City Human
25 Rights Law, as far as being treated less well, who is he suing,
he's only suing the females as oppose to the males. Again,
that demonstrates there is evidence of bias there, your Honor.
Unless the judge has any questions?

26
27 THE COURT: I do. Why is it on the counterclaims, why

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1 hasn't the defendant offered sufficient evidence to go to a
2 jury from in the form of the declarations from Stone and Leslie
3 to the effect that, she's the only other signatory on the
4 account besides Stone. She made out the checks to cash. I
5 didn't authorize her to make out the checks to cash. The
6 business doesn't have any need for cash. You've got a view
7 from your client that those were all for legitimate reasons,
8 but you urge me on your claims to view the evidence favorably,
9 construe every inference in favor of your client. On the
10 counterclaims, I have to construe the inferences in favor of
11 the defendant.

12 MR. DiCHIARA: First of all, Judge, there is a
13 three-year statute of limitations on the counterclaim. A lot
14 of these allegations by the defendants date decades back. No
15 one has any memory. No one can say, oh, yeah, this check, this
16 money went into plaintiff's account. And there's no evidence
17 of that. But I would point out too, the number of lies that
18 the defendants have documented in this case, and they've
19 submitted to the Court as evidence of retaliation when it comes
20 to the counterclaim.

21 First in the counterclaim itself, right, the
22 defendant's allege that plaintiff was working for another
23 company while she worked for defendants. And Stone admitted at
24 his deposition that wasn't true, that he misspoke, right. And
25 this is a document that was filed after consideration

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1 consulting with an attorney. There was no pressure to file
2 this or to put that statement in there.

3 THE COURT: All of this sounds like that that means
4 that there's a great jury question that you've got. Just as I
5 said to the other guy, you know, listen, you've got terrific
6 jury arguments. Maybe you've got terrific jury arguments, but
7 doesn't it go to the jury?

8 MR. DiCHIARA: Well, I think it does go to the jury,
9 but I think it's also evidence of retaliation, going back to
10 the retaliatory aspect of the counterclaim, Judge. Again --
11 cause I know we're conflating things here. A lot of the
12 evidence supports multiple claims here that are going on. But
13 not only did -- Leslie's declaration was clearly false. Again,
14 that was something that was submitted. She had time to think
15 about it. She could have reviewed documents. She didn't. She
16 put that in there. It just shows the desperation for these
17 counterclaims.

18 THE COURT: I'm looking forward to your
19 cross-examination on Leslie. You probably are also.

20 MR. DiCHIARA: Yes, I am. Because even Stone, when he
21 submitted his declaration said, I didn't know about these bank
22 accounts, right, until after plaintiff was fired. But he
23 signed these checks from that bank account. He endorsed -- he
24 made checks out that he wrote to experts. How could he claim
25 that he didn't have any knowledge of these bank accounts when

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he was writing checks out. He was endorsing them. Again, this all goes to retaliatory nature of the counterclaims, but also as far as the evidence goes, Stone reviewed every single bank statements since 2016. He didn't notice any improprieties. Nobody even thought to check if something wrong was going on until after plaintiff sent a letter from her previous attorney saying she was unlawfully terminated based on her age and retaliation.

That's when they started to look and dig into documents, oh, yeah, let's -- they were just so angry in response to her daring to allege that she was subject to discrimination that they filed this counterclaim. They even sent documents to the district attorney. Again showing how angry and how motivated by retaliation they were.

Also in the Leslie's declaration, to the extent the Court wants to credit it given her recantation, the exhibits that she provided show that they received exactly what they paid for in transit checks. So there is no evidence that plaintiff took somehow these transit checks -- she can only use them for transportation, whether she used them for parking, whether she used them to take trips.

THE COURT: Is that because the transit checks, they were left in the desk when she departed?

MR. DiCHIARA: They were left in the desk when she departed. They never checked to see how much was actually on

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1 those transit checks. And, in fact -- again, they're just
2 speculating, that somehow plaintiff profited from using these
3 extra transit checks when you can only use them for
4 transportation, right. And I think that's why Leslie got
5 caught in the lie because she kept convincing herself and
6 arguing that these could be used to buy other stuff other than
7 transportation which is not the case.

8 And even with Stone in his deposition testimony he
9 said that plaintiff wrote checks out to herself, and that's how
10 he learned that maybe there is something wrong going on. But
11 she didn't. They didn't produce one single check that she
12 wrote out to herself. Yes, there were checks made out to cash,
13 but we have no idea whether those ended up in plaintiff's
14 pocket or they were used for business reasons for medQuest.
15 Again, it's just speculation and conjecture.

16 And also going back to the exhibits attached to the
17 Leslie's declaration. They show there's a discrepancy between
18 what they ordered in transit checks and what they actually had
19 from years after plaintiff left. So it shows they're doing
20 something wrong, and you'd think that those amounts would
21 reconcile if plaintiff was actually the one who was engaging in
22 malfeasance, but they don't. Their own records show that they
23 don't have any evidence that plaintiff engaged in any
24 malfeasance, other than just speculation. I was going to end
25 there unless you have anymore other questions.

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1 THE COURT: No, very well. That's very helpful. I'll
2 give defendant two more minutes just to respond to anything.

3 MR. DiLORENZO: Just a couple of things, Judge. The
4 allegation that she was working for another -- so we picked
5 this case up after the first two hours of her deposition. The
6 pleadings were done, the counterclaim. We got this case late.
7 But the allegation about working somewhere else came from her
8 picture being on a website. She convinced Leslie and Elliot to
9 switch 401 carriers, and she showed up on the website of the
10 company they found afterwards, and there's a number of checks
11 involved in that situation.

12 The transit checks from her own records show that
13 there's discrepancies. The same thing with those cash checks
14 as we said. These comparators, there's nothing in this record
15 that supports these comparators being similarly situated to
16 what happened here. One person was given permission to do work
17 for another company at work as long as it didn't interfere with
18 his work, and he worked part-time. There's no evidence in this
19 record that supports that they were actually comparators
20 treated differently than her because she is a women.

21 The two women they're talking about that got sued
22 started a competing business. It's a restrictive covenant case
23 on a breach of confidentiality, soliciting clients. That's
24 where those two women that got sued, and that was recently.
25 That was about a year ago I think, and I'll stop there, your

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2 Honor, unless you have any questions.

3 THE COURT: The only question I'm got is procedural.
4 Can you refresh me. Have I set a date yet for on the
5 assumption that I deny the motions for summary judgment, I
6 haven't made a decision but, I have given you a date for a
joint pretrial order or for trial.

7 MR. DiLORENZO: Not that I remember, your Honor. I
8 think I would have wrote it down.

9 MR. DiCHIARA: I think we do have a trial date in
10 February. I don't have my phone.

11 THE COURT: I'm going to try to get you a decision
12 quickly in any event, but I would appreciate no more than two
13 to three single space pages if that on whether the Circuit's
14 decision in *Milord* has any relevance to the issues in the case.
15 Thank you both. Very helpful.

16 (Adjourned)

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